Supreme Court, U.S.
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No. 04- 041421

IN THE

Supreme Court of the United States

RODERICK LeGRAND,

Petitioner,

v.

AREA RESOURCES FOR COMMUNITY AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether conduct including unwelcome requests to view pornography, plus unwelcome solicitations of sexual acts, coupled with an unwelcome kiss on the lips, a hug, and physical touching of an employee's thigh, buttocks and genitals in the workplace is sufficiently severe or pervasive to create an actionable hostile work environment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and this Court's sexual harassment jurisprudence.

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STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the United States Court of Appeals for the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Eighth Circuit issued its decision on January 20, 2005.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge an individual or otherwise to discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

> individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

29 C.F.R. § 1604.11(a)(3):

> Workplace conduct constitutes "sexual harassment" where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."

STATEMENT OF THE CASE

Rodrick LeGrand was employed by Area Resources for Community and Human Services (ARCHS) as a facilitator working with residents and community leaders to revitalize neighborhoods. Part of his job involved meeting with Father Maurice Nutt, an ARCHS board member and priest whose parish was located in the community being developed by ARCHS.

In March 2001, Father Nutt made the first of several unwelcome sexual advances toward LeGrand. During a meeting at Father Nutt's church, Father Nutt asked LeGrand to join him in viewing pornographic movies of men having sex with other men and boys. Father Nutt described the movies in graphic detail and requested that LeGrand "jerk him off."[1] Father Nutt also described how he and his

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[1] Petitioner apologizes for the blunt, explicit descriptions. However, petitioner believes the Court must know these details and the actual language used to properly assess the environment as it was experienced by petitioner.

college roommate used to relieve stress by watching videos of men having sex with men and masturbating each other with lotion and invited LeGrand to do the same. LeGrand rejected the advances and told Father Nutt, "No, I'm not interested. I'm not gay. I'm married." LeGrand reported the incident to his direct supervisors in April 2001 and tried to avoid Father Nutt thereafter.

In a November 2001 meeting, Father Nutt again solicited LeGrand to watch man/man and man/boy pornographic videos with him. Then, Father Nutt kissed LeGrand on the lips, grabbed LeGrand's buttocks and touched LeGrand's genitals through his pants. LeGrand pushed him away and became physically sick. Father Nutt stated that LeGrand's advancement in the company depended on his willingness to watch the pornographic videos and masturbate Father Nutt. Father Nutt admitted hugging and kissing LeGrand and further admitted to "brush[ing LeGrand's] crotch with the back of [his] hand . . . because it seemed that [LeGrand] was stimulated by the hug." The final incident occurred during a December 2001 meeting at the ARCHS office in which Father Nutt reached under the table and rubbed LeGrand's thigh.

LeGrand later filed this Title VII suit against ARCHS claiming that Father Nutt's conduct created a hostile work environment. The District Court granted summary judgment to ARCHS on the basis that Father Nutt's conduct was not so severe or pervasive as to alter a term, condition or privilege of LeGrand's employment. The Eighth Circuit affirmed, holding that Father Nutt's behavior did not rise to the level of actionable hostile work environment sexual harassment because "none of the incidents [were] physically violent or overtly threatening" and "the three isolated incidents, which

occurred over a nine-month period, were not so severe or pervasive as to poison LeGrand's work environment." 394 F.3d 1098, 1102-03.

REASONS FOR GRANTING THE PETITION

ACTIONABLE SEXUAL HARASSMENT ARISES FROM CONDUCT SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER THE CONDITIONS OF THE VICTIM'S EMPLOYMENT AND CREATE AN ABUSIVE WORKING ENVIRONMENT AND DOES NOT REQUIRE PHYSICALLY VIOLENT OR OVERTLY THREATENING CONDUCT.

A. The essential standard is articulated in Title VII and EEOC Guidance.

The Civil Rights Act of 1964 protects individuals from unlawful employment practices, including discrimination with respect to the terms, conditions or privileges of employment, because of their race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). Given that the inclusion of "sex" as a protected category was a last minute addition to the Title VII bill that ultimately passed, "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on sex." *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 63-64 (1986). Despite the limited legislative history, this Court has recognized that the phrase "'terms, conditions or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment." *Id.* at 64 (citing *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707 (1978)).

In 1980, the EEOC issued Guidelines indicating that the broad spectrum of actionable conduct includes "sexual harassment." Specifically, the Guidelines provide that workplace conduct constitutes "sexual harassment" where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." 29 C.F.R. § 1604.11(a)(3). This articulation of harassment "drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult." *Meritor,* 477 U.S. at 65.

B. This Court's sexual harassment jurisprudence confirms that actionable conduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

In 1986, this Court confirmed in *Meritor Savings Bank v. Vinson* that a claim of "hostile environment" sex discrimination (sexual harassment) is actionable under Title VII. *Id.* at 73. A plaintiff may establish such a claim by "proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67 (brackets in original).

In *Meritor,* Vinson alleged that her supervisor demanded sexual favors (resulting in 40-50 unwelcome sexual encounters), fondled Vinson in front of coworkers, followed her into the restroom, exposed his genitals to her, and raped

her. These allegations "include not only pervasive harassment but also criminal conduct of the most serious nature." *Id.* As such, they were "plainly sufficient" to state a hostile environment sexual harassment claim. *Id.*

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), this Court revisited the issue of what constitutes sufficiently "severe or pervasive" conduct for purposes of a Title VII hostile work environment claim. Harris alleged several instances of verbal harassment by Forklift's owner, including the comments "You're a woman, what do you know?," "You're a dumb ass woman," and "Let's go to the Holiday Inn to negotiate your raise." She also alleged that Forklift's owner asked her and other female employees to retrieve coins from his front pants pockets and requested that they bend over and retrieve objects he had thrown on the ground. The "last straw" was when the owner asked her, "What did you do, promise the guy . . . some [sex] Saturday night?" when discussing a deal Harris had negotiated with a customer. Harris quit and subsequently pursued a Title VII hostile environment claim. *Harris,* 510 U.S. at 19.

The district court dismissed the claim on the grounds that the harassing conduct was not severe or pervasive enough to affect Harris' psychological well-being or cause her injury. *Id.* at 20. The Sixth Circuit affirmed. *Id.* This Court reversed and remanded, stating that the "severe and pervasive" standard takes "a middle path between making actionable any conduct that is merely offensive and requiring conduct to cause a tangible psychological injury." *Id.* at 21. The "middle path" takes into account both objective and subjective criteria: the conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person

would find hostile or abusive" and the victim must "subjectively perceive the environment to be abusive." *Id.*

Harris reaffirmed the standard first articulated in *Meritor* as follows:

> When the workplace is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," Title VII is violated. (citations omitted). *Id.*

This Court resisted articulating a "bright line" rule defining the boundaries of actionable conduct in *Harris.* After all, "[t]his is not, and by its nature cannot be, a mathematically precise test." *Id.* at 22. Instead, it recognized that whether an environment is "hostile" or "abusive" must be determined by looking at all the circumstances. Circumstances to be considered may include:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

In *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998), this Court confirmed that same-sex harassment is actionable under Title VII. It also made it clear that *Meritor's* reasonableness standard and *Harris'* recognition of the

totality of circumstances applied equally to same-sex and mixed-sex harassment claims:

> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances" . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, relationships which are not fully captured by a single recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. *Id.* at 81-82.

In *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), this Court reviewed its sexual harassment jurisprudence and confirmed that standards articulated in *Meritor, Harris* and *Oncale* are "sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Faragher*, 524 U.S. at 788. "A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents *(unless extremely serious)* will not amount to discriminatory changes in the 'terms and conditions of employment.'" (emphasis added). Recognizing that "conduct must be extreme to amount to a change in the terms and conditions of employment," the Court pointed to *Carrero v. New York*

City Housing Auth., 890 F.2d 569, 577-78 (2nd Cir. 1986), as a case that had "heeded this view."[2] *Faragher,* 524 U.S. at 788.

In *Carrero,* the extreme conduct at issue included touching Carrero's knee and arm, kissing her neck and attempting to kiss her on the lips, but did not involve a request for sex. *Carrero,* 890 F.2d at 573, 578. These allegations are similar to Petitioner LeGrand's, but LeGrand's allegations are more extreme to the extent that Father Nutt requested sex, touched LeGrand's genitals and was successful in kissing LeGrand on the lips. The Second Circuit "emphatically" rejected the argument that Carrero's allegations involved merely "trivial behavior" not pervasive enough to establish a VII sexual harassment claim:

> A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII. It is not how long the sexual innuendos, slurs, verbal assaults or obnoxious course of conduct lasts. The offensiveness of the individual actions complained of is also a factor to be considered in determining whether such actions are pervasive.

Id. at 578.

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[2] The Court also cited *Moylan v. Maries County*, 792 F.2d 746, 749-50 (8th Cir. 1986), a case decided ten days prior to *Meritor* that was the first Eighth Circuit case to recognize a sexual harassment claim under Title VII.

C. Courts of Appeals have distorted this Court's jurisprudence by misapplying the "severe or pervasive" standard and requiring more than a few isolated incidents, regardless of their level of severity.

This Court affirmatively recognized *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577-78 (2nd Cir. 1986), as having "heeded [its] view" in identifying conduct extreme enough to change the terms and conditions of employment. *Faragher,* 524 U.S. at 788. Other Courts of Appeals have been less mindful of this Court's jurisprudence in their sexual harassment decisions. *See e.g., LeGrand v. Area Resources for Community and Human Services,* 394 F.3d 1098 (8th Cir. 2005) (App. A); *Duncan v. General Motors Corp.,* 300 F.3d 928 (8th Cir. 2002); *Shepherd v. Comptroller of Pub. Accounts,* 168 F.3d 871 (5th Cir. 1999).

The Courts of Appeals need guidance in recognizing that an actionable sexual harassment may be triggered by a single act or a few isolated incidents, depending on the severity of the conduct alleged. They also need guidance in recognizing that the totality of the circumstances analysis is improperly applied when courts carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode. Without this guidance, the result is to distort the meaning of "severe or pervasive" and "conditions of employment" to the point that actionable claims (some involving criminal conduct) are dismissed or overturned in violation of this Court's Title VII jurisprudence. This extreme distortion occurred in *LeGrand v. Area Resources for Community and Human Services,* 394 F.3d 1098 (8th Cir. 2005).

In *LeGrand*, the Eighth Circuit determined as a matter of law that Father Nutt's conduct was not severe or pervasive enough to alter a term, condition or privilege of LeGrand's employment in part because "more than a few isolated incidents are required." (App. A, p.7a) (citing *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 980 (8th Cir. 2003)). Tracing back from *Alagna,*, this holding was first articulated by the Eighth Circuit in *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997) (citing *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67 (1986)). *Kimzey's* citation to *Meritor* is incorrect. This Court has never stated, in *Meritor* or any other case, that a single incident or a few isolated incidents will, as a rule, be quantitatively insufficient to meet the actionable conduct threshold. To the contrary, this Court has indicated that "extremely serious" isolated incidents may amount to discriminatory changes in the terms and conditions of employment. See *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998). Courts ignoring this rule risk the absurd possibility of dismissing a sexual harassment claim in which an employee alleges a single occurrence of rape. Clearly, such situations demand recognition that the harassment affected a term, condition or privilege of the victim's employment.

In *LeGrand,* the Eighth Circuit also determined as a matter of law that Father Nutt's conduct was not severe or pervasive enough to alter a term, condition or privilege of LeGrand's employment because "none of the incidents [were] physically violent or overtly threatening." (App. A, p.9a). Whether the alleged conduct is "physically threatening" is certainly one factor that may be considered under the *Harris* totality of the circumstances test, *see Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993), but physical violence and overt threats are not independent requirements for conduct to be actionable, as the Eighth Circuit suggests in *LeGrand. See id.*

The Eighth Circuit also found in *LeGrand* that "three isolated incidents, which occurred over a nine-month period, were not so severe or pervasive as to poison LeGrand's work environment." (App. A. p.9a). By analyzing Father Nutt's conduct as discrete, separate events, the court ignored the very principle it approved in *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559, 564 (8th Cir. 1992):

> Under the totality of the circumstances analysis, the district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991). A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents but on the overall scenario. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990); *see also Vance v. Southern Bell Tel. &Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989).

Ultimately, the Eighth Circuit ignored the humiliating, sexual nature of Father Nutt's conduct and downplayed the threatening, offensive invasion of LeGrand's personal space. Instead, it characterized the requests to view pornographic movies, requests for masturbation, touching of LeGrand's thigh, buttocks and genitals, and the kiss and hug as

"manifestly inappropriate" and "ranging from "crass to churlish." *Id.* As this Court explained in *Oncale,* "common sense and an appropriate sensitivity to social context" show that Father Nutt's conduct was not "simple teasing or roughhousing among members of the same sex" but was overtly sexual "conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Oncale,* 523 U.S. at 82. It is precisely this conduct that affected LeGrand's workplace conditions and created the hostile environment.

If Father Nutt's conduct were merely coarse, rude and boorish, or merely horseplay, what more must he say or do for his conduct to rise to the level of a Title VII sexual harassment violation? Would it have made a difference if the genital touching had occurred twice instead of only once? Would Father Nutt's conduct have crossed the line from churlishness to illegal if it had occurred two days in a row? These questions are eliminated if courts properly follow this Court's standards for evaluating hostile work environment sexual harassment claims.

However, this Court's standards are not being applied faithfully. For example, many lower courts cite *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) for the abbreviated proposition that the plaintiff must prove his workplace was 'permeated with discriminatory intimidation, ridicule, and insult." *See e.g., LeGrand,* App. A. at p.7a; *Bowie v. Advanced Ceramics Corp.*, 72 Fed. Appx. 258, 264 (6th Cir. 2003); *Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421, 426 (7th Cir. 2004); *Lewis v. Redding Medical Ctr.,* 1994 U.S. App. LEXIS 7989, 2-3 (9th Cir. 1994); *Ballard v. Kandarian,* 2002 U.S. App. LEXIS 26759, 2-3 (D.C. Cir.

2002). The full context of this inquiry, as stated by this Court in *Harris* is as follows:

> *When* the workplace is permeated with "discriminatory intimidation, ridicule, and insult" *that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,* Title VII is violated." (citations omitted). *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (emphasis added).

Title VII's prohibition against sex discrimination with respect to an employee's terms, conditions or privileges of employment covers more than "terms" and "conditions" in the narrow contractual sense. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998). "Conditions," in a broader context, encompass the "entire spectrum of disparate treatment." *Id.* (quoting *Meritor,* 477 U.S. at 64)). Surely that spectrum includes the condition of having to endure workplace meetings, as LeGrand did, in which a member of the board of directors of his employer engaged in conduct that can only be described as permeating the environment with offensive and overtly sexual words and deeds. Even under a strict interpretation of "terms and conditions of employment," Father Nutt's conduct more than qualifies as creating a hostile work environment, given his comment that LeGrand's advancement in the company depended on LeGrand's willingness to go along with Father Nutt's sexual requests.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JANUARY 20, 2005

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-1284

RODRICK LeGRAND,

Appellant,

v.

AREA RESOURCES FOR COMMUNITY AND HUMAN SERVICES,

Appellee.

November 15, 2004, Submitted

January 20, 2005, Filed

OPINION

RILEY, Circuit Judge.

Rodrick LeGrand (LeGrand) appeals the district court's[1] grant of summary judgment in favor of Area Resources for Community and Human Services (ARCHS) on LeGrand's sexual harassment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and the Missouri

1. The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

Appendix A

Human Rights Act (MHRA), Mo. Rev. Stat. §§ 213.010-213.137. We affirm.

I. BACKGROUND

ARCHS, a non-profit organization, implemented the Sustainable Neighborhood Initiative (Initiative), which sought to revitalize local communities through citizen and neighborhood-driven planning. LeGrand worked for ARCHS as a neighborhood facilitator, and he served the Covenant-Blu, Grand Center, and Vandeventer, Missouri communities. As a neighborhood facilitator, LeGrand worked with residents and community leaders to plan development of the community. LeGrand's responsibilities included organizing a Neighborhood Leadership Team, which generated ideas to improve the neighborhood and provided direction to LeGrand to facilitate such ideas.

LeGrand's direct supervisors were Initiative Coordinators Lisa Potts (Potts) and Lucille Walton (Walton). The Initiative's program included a Personnel Committee, which utilized community members to evaluate ARCHS's employees' performance. The Personnel Committee advised Potts and Walton regarding employment matters, but Potts and Walton had the final authority to hire, fire, and discipline ARCHS's employees.

Father Maurice Nutt's (Father Nutt) parish was located within the CovenantBlu, Grand Center, and Vandeventer communities. Father Nutt was an ARCHS board member and a co-chair of the Initiative. As an ARCHS board member, Father Nutt consulted and advised Potts and Walton on

neighborhood issues. However, Father Nutt was not a member of the Personnel Committee, and he did not make any decisions or any recommendations regarding employment matters.

LeGrand alleges Father Nutt made unwelcome sexual advances toward him on three separate occasions. The first incident allegedly occurred on March 22, 2001, when LeGrand visited Father Nutt's church to give Father Nutt a community update. After Father Nutt gave LeGrand a tour of the facilities and introduced LeGrand to some of the church's staff members, LeGrand claims Father Nutt asked LeGrand to watch pornographic movies with him and "to jerk off with him" to relieve stress. LeGrand responded, "No, I'm not interested. I'm not gay. I'm married. I [don't] get down like that." In April, LeGrand reported the incident to Potts and Walton, who told LeGrand to document the incident in writing, which LeGrand did. A few weeks later, Potts and Walton suggested LeGrand seek counseling through ARCHS's Employee Assistance Program (EAP). LeGrand met with an EAP counselor in May 2001.

After the first incident, LeGrand tried to avoid Father Nutt. However, in November, LeGrand encountered Father Nutt at the ARCHS office after Father Nutt had a meeting with Potts and Walton. LeGrand contends Father Nutt (1) mentioned the pornographic movies again; (2) suggested LeGrand would advance in the company, if he watched "these flicks" and "jerk[ed Father Nutt's] dick off"; (3) "kissed [LeGrand] in the mouth"; (4) grabbed LeGrand's buttocks; and (5) "reached for [LeGrand's] genitals." LeGrand pushed Father Nutt in the chest and said, "You motherfucker." Father

Nutt later admitted hugging and kissing LeGrand, but Father Nutt believed the "peck on the lips" was "mutual." Father Nutt also admitted to "brush[ing LeGrand's] crotch with the back of my hand [, . . . b]ecause it seemed that [LeGrand] was stimulated by the hug." The third incident allegedly occurred in December, when Father Nutt briefly gripped LeGrand's thigh while each were seated at a table during a meeting at the ARCHS office.

ARCHS maintains a sexual harassment policy, which is contained in its employee handbook. When LeGrand was employed by ARCHS, he received a copy of the employee handbook and was aware of the policy. The handbook's "NoHarassment Policy" states an employee should complain to his immediate supervisor, and if the employee is not satisfied with the supervisor's response, the employee should contact the Human Resources Manager. LeGrand did not contact the Human Resources Manager regarding his allegations against Father Nutt.

On December 21, LeGrand filed a sexual harassment charge against ARCHS with the Equal Employment Opportunity Commission (EEOC). After filing his EEOC charge, LeGrand visited an EAP counselor five times over the following six months. In January 2002, LeGrand took medical leave from ARCHS. While LeGrand was on medical leave, ARCHS eliminated all neighborhood facilitator positions, including LeGrand's position, due to a lack of funding. In August, ARCHS offered LeGrand the opportunity to interview for the Community Development Coordinator position, which LeGrand declined because he had accepted a position with more pay at another organization.

Appendix A

In February 2002, after the EEOC investigated LeGrand's harassment charge, ARCHS requested and received Father Nutt's resignation from its Board of Directors. ARCHS also disciplined both Potts and Walton for not following ARCHS's "No Harassment Policy."

LeGrand later sued ARCHS in federal court, claiming Father Nutt's sexual advances constituted *quid pro quo* sexual harassment and created a hostile work environment. The district court ruled LeGrand's *quid pro quo* sexual harassment claim failed, because LeGrand did not establish he was subjected to tangible employment action resulting from his refusal to submit to Father Nutt's advances. The district court also rejected LeGrand's hostile work environment claim, because (1) Father Nutt was not LeGrand's supervisor; (2) Father Nutt was not LeGrand's coworker; and (3) the harassment "was not so severe or pervasive as to alter a term, condition, or privilege of LeGrand's employment."

On appeal, LeGrand challenges the district court's conclusion that (1) Father Nutt was not LeGrand's supervisor, and (2) Father Nutt's conduct was not so severe or pervasive as to constitute actionable sexual harassment. LeGrand does not appeal the district court's grant of summary judgment on his *quid pro quo* sexual harassment claim.

II. DISCUSSION

We review de novo a district court's grant of summary judgment. *Schoolhouse, Inc. v. Anderson*, 275 F.3d 726, 728 (8th Cir. 2002). When considering a motion for summary

judgment, we view the evidence in the light most favorable to the nonmoving party. *Id.* Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c). We analyze LeGrand's hostile work environment claims under both Title VII and the MHRA in the same manner. *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1056 n.6 (8th Cir. 2004).

In granting summary judgment to ARCHS, the district court determined Father Nutt was neither LeGrand's supervisor nor LeGrand's co-worker. Because we conclude LeGrand failed to establish a prima facie case of hostile work environment sexual harassment, we do not address whether Father Nutt was LeGrand's supervisor or co-worker.

To establish a prima facie case of hostile work environment sexual harassment, LeGrand must prove (1) he is a member of a protected group, (2) he was subjected to unwelcome sexual harassment, (3) the harassment was based on sex, and (4) the harassment affected a term, condition, or privilege of his employment. *Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir. 2003) (citing *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 933 (8th Cir. 2002)). Assuming LeGrand established the first three elements, we will focus only on the fourth element. To meet his burden on the fourth element, LeGrand "must demonstrate the unwelcome harassment was sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment." *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 993 (8th Cir. 2003).

"Sexual harassment 'standards are demanding-to be actionable, conduct must be extreme and not merely rude or unpleasant.'" *Tuggle*, 348 F.3d at 720 (quoting *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 980 (8th Cir. 2003)). "'More than a few isolated incidents are required,' and the alleged harassment must be 'so intimidating, offensive, or hostile that it poisoned the work environment.'" *Id.* (quoting *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 967 (8th Cir. 1999)). LeGrand must prove his workplace was "permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). We consider the "totality of the circumstances" to determine whether a work environment is hostile or abusive. *Baker v. John Morrell & Co.*, 382 F.3d 816, 828 (8th Cir. 2004). We look to a number of factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23.

Compared to other cases in which the Supreme Court and our circuit have found the harassing conduct did not constitute sexual harassment, we believe the harassment alleged in this case did not create an actionable hostile work environment. In Duncan, we determined the plaintiff failed to show the harassing conduct was "sufficiently severe or pervasive so as to alter the conditions of her employment, a failure that dooms [her] hostile work environment claim." *Duncan*, 300 F.3d at 935. In Duncan, we considered five harassing incidents: a proposition for a relationship; improper touching of the plaintiff's hand on multiple occasions; a

request the plaintiff sketch a sexually objectionable planter; the posting of a "Man Hater's Club" poster; and a request the plaintiff "type the He-Men Women Haters beliefs." *Id.* at 933-34. The alleged harasser also had in his office a child's pacifier in the shape of a penis and a computer screen saver with a picture of a naked woman. *Id.* at 931. While the harassment made the plaintiff uncomfortable and was "boorish, chauvinistic, and decidedly immature," we held it did not meet the standard necessary to be actionable. *Id.* at 935. Thus, in overturning a jury verdict and concluding the district court improperly denied the defendant's post-trial motion for judgment as a matter of law, we held the plaintiff did not show a sufficiently hostile work environment. *Id.*

Following Duncan, we have found summary judgment proper in several cases, due to the plaintiff's failure to meet the fourth element of a hostile environment sexual harassment claim. See, e.g., *Tuggle*, 348 F.3d at 714, 722 (holding while the plaintiff "was clearly subjected to harassing conduct," it was not "actionable conduct" where a co-worker made a number of comments based on the plaintiff's sex and posted a photograph showing the plaintiff's "clothed rear end"); *Ottman v. City of Independence*, 341 F.3d 751, 760 (8th Cir. 2003) (concluding the district court erred in finding a triable issue for the jury where the conduct consisted of belittling and sexist remarks on almost a daily basis); *Meriwether*, 326 F.3d at 993 (holding sexual harassment claim failed where a co-worker grabbed the plaintiff's buttock and then confronted her about it the next day); *Alagna*, 324 F.3d at 977-78, 980 (concluding the co-worker's conduct was inappropriate, but not sufficiently severe or pervasive where it included calls to the plaintiff's home, frequent visits to her office,

discussions about relationships (not including sexual details) with his wife and other women, touching the plaintiff's arm, saying he "loved" her and she was "very special," placing romance novels in her faculty mailbox, and invading her personal space).

Viewing LeGrand's claim in light of the demanding standard set by the Supreme Court and by *Duncan* and its progeny, Father Nutt's behavior did not rise to the level of actionable hostile work environment sexual harassment. None of the incidents was physically violent or overtly threatening. There can be no doubt Father Nutt's actions, admitted and alleged, ranged from crass to churlish and were manifestly inappropriate; however, the three isolated incidents, which occurred over a nine-month period, were not so severe or pervasive as to poison LeGrand's work environment. Therefore, we hold LeGrand failed to establish the existence of a trialworthy question of fact on his hostile work environment claim.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of ARCHS.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED DECEMBER 17, 2003

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Case No. 4:02CV649SNL

RODERICK LEGRAND,

Plaintiff,

vs.

AREA RESOURCES FOR COMMUNITY and HUMAN SERVICES,

Defendant.

MEMORANDUM

Plaintiff has brought this Title VII and Missouri Human Rights Act (MHRA) employment discrimination action alleging *quid pro quo* sexual harassment and hostile work environment sexual harassment. This matter is before the Court on defendant Area Resources for Community and Human Services' (ARCHS) supplemental motion for summary judgment (#47), filed September 26, 2003.[1]

1. On July 14, 2003 this Court granted defendant ARCHS leave to file a supplemental motion for summary judgment due to discovery abuses committed by plaintiff and his counsel. *See,* Court Order #43.

Appendix B

This case is set for trial on the Court's jury trial docket of January 12, 2004.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Fed.R.Civ.P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Com.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

Appendix B

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976). Although summary judgment should seldom be granted in employment discrimination cases, it is proper in those cases wherein the plaintiff fails to establish a factual dispute on an essential element of the case. *Snow v. Ridgeview Medical Center*, 128 F.3d. 1201, 1205 (8th Cir. 1997), citing *Bialas v. Greyhound Lines, Inc.*, 59 F.3d. 759, 762 (8th Cir. 1995). "Although summary judgment is to be used sparingly in employment discrimination cases, it is appropriate where one party has failed to present evidence sufficient to create a jury question as to an essential element of its claim." *Whitley v. Peer Review Sys., Inc.*, 221 F.3d. 1053, 1055 (8th Cir. 2000) (citations omitted).

The facts of this case are largely undisputed.[2] ARCHS is a not-for-profit organization linking health and human services from eight state agencies with neighborhood/ community planning to improve family and community outcomes. In pursuit of this endeavor, ARCHS implemented

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2. Plaintif's untimely response to the instant summary judgment motion was stricken by the Court on October 31, 2003. *See,* Court Order #53. Furthermore, for the record, Court Order #53 is hereby corrected and amended to substitute the correct plaintiff's response date of **October 17, 2003** for the incorrect date of September 17, 2003 as contained in Order #53.

a program entitled "Sustainable Neighborhood Initiative" with the goal of revitalizing neighborhoods through a citizen and neighborhood-driven planning process aimed at improving the living conditions of all residents in these targeted neighborhoods.[3]

Plaintiff was employed by ARCHS from October 2000 until January 2002 as a "neighborhood facilitator" serving the Covenant-Blu, Grand Center and Vandeventer community. As a neighborhood facilitator, plaintiff worked with residents and conununity leaders to facilitate a planning process for development of this particular community. Plaintiff was responsible for organizing a "neighborhood leadership team" consisting of a group of residents and community leaders from his assigned community. This "neighborhood leadership team" would generate ideas and plans for improving the neighborhood and then provide direction to plaintiff for facilitation of their ideas and plans. Defendant's Exhibit C - Deposition of Lisa Potts, pg. 13. In order to carry out his responsibilities, plaintiff and the neighborhood leadership team would have regular meetings to discuss a variety of community issues. Plaintiff carried out his work-related duties from an office leased by ARCHS in a building owned by Grand Rock Community Economic Development, an independent community services organization founded by Father Maurice Nutt.

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3. The background facts are extracted generally from the defendant's Exhibits A-U and defendant's Supplemental Statement of Uncontroverted Material Facts. In some instances, a specific exhibit may be noted by the Court.

Appendix B

Fr. Nutt (during the relevant time-period) was a parish priest in the community assigned to the plaintiff. Fr. Nutt was also a board member of ARCHS and a co-chair of the Sustainable Neighborhoods Initiative.

Plaintiffs direct supervisors were Lisa Potts and Lucille Walton, Coordinators of the Sustainable Neighborhood Initiative. Ms. Potts and Ms. Walton reported to Maggie Hourd Bryant and Robin Gierer, Assistant Director and Director of ARCHS, respectively. As a board member of ARCHS, Fr. Nutt consulted and advised Ms. Potts and Ms. Walton of neighborhood issues but did not expressly make recommendations on employment matters. The Sustainable Neighborhood Initiative program utilized members of the neighborhood community on advisory committees to evaluate the performance of ARCHS' employees. Such advisory committees were the Leadership Team and the Personnel Committee. The Personnel Committee advised Ms. Potts and Ms. Walton regarding employment matters, but Ms. Potts and Ms. Walton had the final authority on hiring, firing, and disciplining ARCHS' employees within the Sustainable Neighborhood Initiative.

Fr. Nutt was not a member of the Leadership Team nor the Personnel Committee.[4] Fr. Nutt had no direct authority

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4. Plaintiff believed that Fr. Nutt was a member of the Leadership Team because Fr. Nutt resided in the neighborhood. Defendant's Exhibit B - Plaintiffs Deposition, pgs. 78, 270. Although plaintiff incorrectly believed that Fr. Nutt was a member of the Leadership Team, his alleged membership on the Leadership Team is immaterial since the Leadership Team is not responsible for making

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over plaintiff's employment and did not make employment recommendations to ARCHS.

Plaintiff alleges three separate incidents of inappropriate conduct by Fr. Nutt towards plaintiff. On March 22, 2001 Fr. Nutt allegedly asked plaintiff to watch pornographic movies with him and talked with plaintiff about relieving stress with masturbation. Plaintiff rebuffed the overture by Fr. Nutt. Plaintiff did not report this March 22, 2001 incident to his supervisors until mid-April 2001. Sometime in mid-April, 2001 plaintiff was approached by Ms. Potts and they engaged in a general conversation regarding plaintiff's work. It was then that plaintiff reported to Ms. Potts of the alleged inappropriate behavior by Fr. Nutt. Plaintiff, Ms. Potts, and Ms. Walton discussed the alleged incident and Ms. Potts and Ms. Walton suggested to plaintiff that he avoid further contact with Fr. Nutt; to seek counseling with ARCHS' Employee Assistance Program (EAP); to tell his (plaintiff's) wife of the alleged incident; to take a neighborhood representative with him if he had to meet with Fr. Nutt about neighborhood matters; and to document in writing the alleged incident. They further suggested to plaintiff their willingness to attend with him any meetings plaintiff had which Fr. Nutt may attend. Plaintiff took some of the suggestions to heart; i.e. he avoided contact with Fr. Nutt, told his wife about the incident, and saw an EAP counselor in May, 2001.

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employment decisions regarding ARCHS' employees. Plaintiff's Deposition, pg. 269; Defendant's Exhibit A - Potts' Affidavit; Defendant's Exhibit I - Deposition of Fr. Maurice Nutt, pg. 20.

Seven months went by without incident. However, in November 2001, plaintiff alleges that he encountered Fr. Nutt alone and that Fr. Nutt hugged plaintiff, kissed plaintiff, and brushed his hand against plaintiff's crotch area. Plaintiff further alleges that Fr. Nutt asked him to watch pornographic movies with him again. Plaintiff again rebuffed this overture by Fr. Nutt. Plaintiff reported this incident to Ms. Potts and Ms. Walton. They offered to reassign plaintiff to a different neighborhood outside of Fr. Nutt's parish; thereby limiting further plaintiff's contact with Fr. Nutt. They also offered to move plaintiff's office from its present location to the ARCHS' office location.

The third alleged incident of inappropriate behavior by Fr. Nutt occurred on December 10, 2001. Plaintiff alleges that during a meeting with Fr. Nutt, in the presence of other individuals, Fr. Nutt briefly touched plaintiffs thigh while sitting next to him. The touch was a matter of seconds since plaintiff moved Fr. Nutt's hand "very quickly". Plaintiff's Deposition, pg. 115. Nothing was said by Fr. Nutt during this incident.[5]

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5. Fr. Nutt denies ever requesting that plaintiff watch pornographic movies and masturbate with him. Fr. Nutt's Deposition, pg. 50. Fr. Nutt also denies any meeting or contact with plaintiff in November, 2001. However, he admits encountering plaintiff on December 10, 2001 and hugging plaintiff, kissing plaintiff, and brushing plaintiff's crotch with the back of his hand. Fr. Nutt's Deposition, pgs. 76-77, 79-80. Ms. Potts testified (at her deposition) that following a board meeting in November, 2001 plaintiff and Fr. Nutt met together alone in Ms. Walton's office. Pott's Deposition, pgs. 28-29. For purposes of addressing the defendant's summary judgment motion only, the Court will assume that the three (3) alleged incidents of inappropriate behavior by Fr. Nutt towards plaintiff did occur.

Plaintiff immediately reported this incident to Ms. Potts and Ms. Walton. On December 20, 2001 plaintiff filed a charge of sexual harassment against ARCHS with the EEOC regarding the conduct of Fr. Nutt. Following the filing of the EEOC charge and investigation, in February 2002, ARCHS requested and received Fr. Nutt's resignation from the Board of Directors for ARCHS.

Prior to filing his EEOC charge, plaintiff made two (2) visits to an EAP counselor: May 11, 2001 and May 16, 2001. Following the filing of his EEOC charge, plaintiff had contact with an EAP counselor six (6) times: January 10, 2002; January 17, 2002; February 7, 2002; February 20, 2002; June 5, 2002; and June 6, 2002. In addition, following the filing of his EEOC charge, plaintiff sought medical treatment from a new primary care physician and counseling from a new private therapist. Defendant's Exhibit O; Plaintiff's Deposition, pgs. 176-77.

During the relevant time-period (March-December, 2001), plaintiff did not incur an increased number of absences. He voluntarily took vacation days from work on March 26-31, 2001; July 20, 2001; August 2-3, 2001; August 6-10, 2001; and August 17, 2001. Some of this vacation time included his child's "spring break", a trip to Washington, D.C. to attend a workshop for a democracy organization; and a college football game in Kansas City.

In January 2002, plaintiff took medical leave from ARCHS. While on medical leave, ARCHS eliminated all neighborhood facilitator positions, including plaintiff's position, due to funding shortages. However, in July/August,

2002 plaintiff was offered the comparable position of Community Development Coordinator which plaintiff declined because he had taken another job with more pay. Defendant's Exhibit K.

As a result of its investigation following the filing of plaintiffs EEOC charge, ARCHS disciplined both Ms. Potts and Ms. Walton for failing to follow ARCHS' protocol regarding sexual harassment complaints. Both were suspended for a period of time, placed on probation for a period of time, and directed to attend employment discrimination training seminars. Defendant's Exhibits S and T.

Plaintiff alleges that Fr. Nutt's conduct towards him constituted *quid pro quo* sexual harassment and created a hostile work environment for him. Defendant ARCHS contends that plaintiff cannot support a claim for *quid pro quo* sexual harassment because even assuming that Fr. Nutt made threats of retaliation,[6] such alleged threats were never carried out by Fr. Nutt or any representative of ARCHS. Defendant further contends that plaintiff's sexual harassment hostile work environment claim must also fail because plaintiff's allegations of harassment are not sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment. After

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6. Although there is no affirmative evidence before the Court regarding alleged threats of retaliation by Fr. Nutt, the Court will accept (for purposes of addressing the defendant's summary judgment motion) as accurate plaintiffs assertion that Fr. Nutt suggested that plaintiff's acquiescence to his advances would further plaintiffs career and that rejection of same might hurt his career.

careful consideration of the pleadings and exhibits before the Court, the Court finds that plaintiff has failed to make actionable prima facie cases of *quid* pro *quo* sexual harassment and sexual harassment hostile work environment.[7]

Quid Pro Quo Sexual Harassment

In order to prevail on his claim of *quid* pro *quo* sexual harassment, plaintiff needed to prove that 1) he was a member of a protected class; 2) he was subjected to unwelcome harassment in the form of sexual advances or requests for sexual favors; 3) the harassment was based on sex; and 4) plaintiff's submission to the unwelcome advances was an express or implied condition for receiving job benefits or his refusal to submit resulted in a tangible job detriment. *Ogden v. Wax Works. Inc.*, 214 F.3d. 999, 1006, n.8 (8th Cir. 2000); *Newton v. Cadwell Laboratories*, 156 F.3d. 880, 882 (8th Cir. 1998); *Cram v. Lamson & Sessions Co.*, 49 F.3d. 466, 473 (8th Cir. 1995).

The record before the Court clearly shows that this is a case of "unfulfilled threats"; i.e. that no tangible employment action took place because plaintiff did not agree to the sexual demands of Fr. Nutt. Plaintiff has failed to provide any affirmative evidence that submission to the sexual advances was a condition of continued employment benefits, or more

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7. Plaintiff's claims arise under both Title VII and the Missouri Human Rights Act. Plaintiffs state-law claim is subject to the same analysis as his Title VII claim; thus, the Court's factual and legal findings are applicable to both his state and federal claims.

importantly (as in plaintiff's case), Fr. Nutt carried out his alleged threats of retaliation due to plaintiff's rejection of his advances. Plaintiff was never demoted or disciplined in any manner during the relevant time-period. Plaintiff never suffered any change in pay, responsibilities, or job-related duties. The termination of plaintiff's position as a neighborhood facilitator was the result of a funding shortage, not plaintiff's rejection of Fr. Nutt's sexual advances. In fact, when funding later became available, plaintiff was offered another comparable position which he rejected for economic reasons. Because plaintiff's claim of *quid pro quo* sexual harassment does not involve either fulfilled threats or other detrimental employment action resulting from his refusal to submit to Fr. Nutt's sexual overtures, plaintiff's claim cannot be maintained as an actionable *quid pro quo* sexual harassment claim. *Newton*, at 883; *Madani v. University of Nebraska Board of Regents*, 242 F.3d. 376 (8th Cir. 2000) (unpublished) (summary judgment properly granted on plaintiff's *quid pro quo* sexual harassment claim for lack of evidence to support plaintiff's contention that she was terminated from medical residency program for rejecting director's sexual advances); *Ellett v. Bit Red Keno, Inc.*, 221 F.3d. 1342 (8th Cir. 2000) (unpublished) (summary judgment properly granted on plaintiff's *quid pro quo* sexual harassment claim where plaintiff did not present evidence capable of proving that his submission to unwelcome advances was an express or implied condition for receiving job benefits or that his refusal to submit resulted in a tangible job detriment)[8]; *see also, Burlington*

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8. Since the Supreme Court's decisions in *Ellerth/Faragher*, *quid pro quo* cases of sexual harassment have been few. Although not its usual practice, the Court cites to these two unpublished opinions because they are fairly recent cases which address summary judgment in regard to a *quid pro quo* sexual harassment claim.

Industries v. Ellerth, 524 U.S. 742, 751 (1998) (*quid pro quo* cases are those in which threats of retaliation are carried out as distinguished from hostile work environment cases wherein such threats are not carried out or absent altogether). Summary judgment will be granted to defendant ARCHS on plaintiff's Title VII and MHRA claims for *quid pro quo* sexual harassment.

Same-Sex Workplace Sexual Harassment

Although plaintiff failed to show a tangible job detriment related to his rejection of Fr. Nutt's advances, he still has the opportunity to present a claim for hostile work environment sexual harassment. In *Ellerth/Faragher*[9], the Supreme Court determined that in "supervisor harassment" cases "the terms quid pro quo' and 'hostile work environment' remain relevant only to the extent they illustrate the evidentiary distinction between cases involving threats which are carried out and those featuring offensive conduct in general." *Ogden*, at 1006 *citing Ellerth, supra.* Where a supervisor's sexual harassment of an employee results in a tangible detrimental job action such as discharge, demotion, or undesirable reassignment, the employer is vicariously liable. *Ogden*, at 1006 *citing Ellerth/Faragher, supra.; Miller v. Woodharbor Molding & Millworks, Inc.*, 179 F.3d. 948, 949 (8th Cir. 1999) *citing Ellerth/Faragher, supra.*; *Newton*, at 883 *citing Ellerth/ Faragher, supra.* When no tangible detrimental job action is taken, the employer is vicariously liable unless the defending employer can prove by a preponderance of the evidence a

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9. *Farnher v. City of Boca Raton*, 524 U.S. 775 (1998) - companion case to *Ellerth, supra.*

two-prong affirmative defense: 1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and 2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ogden* at 1006-1007 *citing Ellerth/ Faragher, supra.; Miller*, at 949 *citing Ellerth/Faragher, supra.; Newton*, at 883 *citing Ellerth/Faragher, supra.* In the instant matter, since LeGrand's claim does not involve either fulfilled threats or other detrimental employment action resulting from his rejection of Fr. Nutt's advances, plaintiff's claim "should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct. *Newton*, at 883 *citing Ellerth*, 524 U.S. at 754. The absence of a detrimental job action allows ARCHS to present the *Ellerth/Faragher* affirmative defense if LeGrand can show that Fr. Nutt's conduct was sufficient to create a hostile work environment. *See, Newton*, at 883-84.

An employee is subject to hostile work environment sexual harassment when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is suffciently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meriwether v. Caraustar Packaging Co.*, 326 F.3d. 990, 993 (8th Cir. 2003) *quoting Harris v. Forklift Systems. Inc.*, 510 U.S. 17, 21 (1993). To state a claim of hostile work environment sexual harassment by a supervisor, a plaintiff must show that 1) s/he belongs to a protected group; 2) she was subjected to unwelcome harassment; 3) the harassment was based on sex; and 4) the harassment affected a term, condition, or privilege of employment. *Duncan v.*

General Motors, 300 F.3d. 928, 933 (8th Cir. 2002)[10]; *Beard v. Flying J, Inc.*, 266 F.3d. 792, 797 (8th Cir. 2001). Where the harassment is allegedly by a non-supervisory coworker, a fifth element is required: 5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Meriwether*, at 993; *Alagna v. Smithville R-II School District*, 324 F.3d. 975, 979 (8th Cir. 2003).

Same-sex harassment claims have been recognized by the courts as actionable under Title VIL.[11] *Oncale v.*

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10. In its memorandum in support of its supplemental motion for summary judgment, defendant sets forth what it purports to be the standard for a *prima facie* case of hostile work environment sexual harassment as stated by *Duncan*, supra. Defendant's recitation is incorrect: Element 2 reads: "that she was subject to unwelcome sexual harassment", not "that she was subject to unwelcome sexual harassment **that is severe and pervasive".** Furthermore, the correct phrase is "severe or pervasive", not "severe and pervasive". *See, Harris v. Forklift Systems. Inc.*, 510 U. S. 17, 21 (1993); *Oncale*, 523 U. S. at 1003 *quoting Harris*, *supra.*; *Duncan*, at 934 *quoting Oncale*, at 81 (internal quotation omitted).

11. Although, at this time, the Court is unable to locate any Missouri case which clearly states that a same-sex sexual harassment hostile work environment claim is actionable under the MHRA, the Court assumes that it is since in deciding cases brought under the MHRA, Missouri courts are guided not only by Missouri law, but also by applicable federal employment discrimination decisions. *See, Mason v. Wal-Mart Stores. Inc.*, 91 S.W.3d. 738, 741-42 (Mo.App. 2002) (Missouri appellate court reviews MHRA claim of hostile work environment sexual harassment under applicable Title VII caselaw); *Thompson v. Western-Southern Life Assurance Co.*, 82 S.W.3d. 203, 206 (Mo.App. 2002) (Missouri appellate court reviews MHRA claim

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Sundowner Offshore Services, 523 U.S. 75 (1998); *see, Elmahdi v. Marriott Hotel Services*, 339 F.3d. 645 (8th Cir. 2003) (jury instruction in Title VII same-sex harassment case proper); *Montandon v. Farmland Industries*, 116 F.3d. 355, 358 (8th Cir. 1997)("A male may assert a claim of sexual harassment against another male."); *Quick v. Donaldson Co., Inc.*, 90 F.3d. 1372, 1377 (8th Cir. 1996). Same-sex harassment claims differ from opposite sex harassment claims because opposite sex harassment claims usually involve explicit or implicit proposals of sexual activity which create a presumption that the underlying activity was based on sex. *Oncale*, 523 U.S. at 80. Such a presumption does not exist in cases of same-sex harassment. Instead, a plaintiff in a same-sex harassment case must show that the harasser's conduct was not merely "tinged with offensive sexual connotations", but actually constituted discrimination based on sex. *Oncale*, 523 U.S. at 79-80; *see also, McCown v. St. John's Health System*, - F.3d. -, 2003 WL 22658188 (8th Cir., November 12, 2003). This can be done in one of three (3) ways, one of which is for a plaintiff to demonstrate that the conduct was motivated by sexual desire. *Oncale*, 523 U.S. at 80-81.

There appears to be no dispute that Fr. Nutt's conduct towards plaintiff involved sexual advances, requests for sexual favors, and verbal and/or physical contact of a sexual

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of hostile work environment sexual harassment under applicable Title VII caselaw); *see* also, *Fry v. Holmes Freight Lines, Inc.*, 72 F.Supp.2d. 1074, 1078 (W.D.Mo. 1999) (Title VII and MHRA claims of hostile work environment same-sex harassment reviewed together in accordance with federal precedent).

nature. Thus, Fr. Nutt's conduct towards plaintiff was based on sex and constitutes harassment based on sex. However, the issue then becomes whether the harassment was of such a degree as to be actionable under Title VII and the MHRA.

Before deciding this issue, there is one thorny issue which the Court must address. It appears that the plaintiff is pursuing his claims against ARCHS because he views Fr. Nutt as a "supervisor". Plaintiff has provided no affirmative evidence to support his conclusion that Fr. Nutt acted in a supervisory position on behalf of ARCHS. The record before the Court belies this contention. Fr. Nutt was a parish priest for a church within plaintiff's assigned neighborhood. Plaintiff did not regularly attend Fr. Nutt's church; i.e. was not a member of Fr. Nutt's congregation. Plaintiffs Deposition, pg. 66. Fr. Nutt was a board member of ARCHS and a cochair of the Sustainable Neighborhoods Initiative. Neither of these positions necessarily make him an employee of ARCHS, moreover, plaintiff's supervisor. Fr. Nutt was not a member of the Personnel Committee which evaluated ARCHS' employees' job performance. He did not make personnel recommendations to Ms. Potts and/or Ms. Walton. He had no authority to make decisions regarding plaintiff's work schedule, plaintiff's assignments, or plaintiff's salary. *See, Kimbrough v. Loma Linda Development*, 183 F.3d. 782, 784 (8th Cir. 1999) (issue of whether plaintiff's harasser was a supervisor was submissible to jury because evidence showed that harasser had authority for scheduling plaintiff's work hours and assignments, including if and when he could send her home). "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent

to make economic decisions affecting other employees under his or her control. . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Ellerth*, 524 U.S. at 762. There is no evidence before the Court that ARCHS empowered Fr. Nutt to make economic decisions affecting the plaintiff: The Court finds that Fr. Nutt was not plaintiffs "supervisor".

However, the record also does not show that Fr. Nutt was a "co-worker" of plaintiff: There is nothing before the Court that shows that Fr. Nutt was an employee of ARCHS. As a board member of ARCHS, Fr. Nutt's responsibilities were to consult with ARCHS' management personnel and implement the overall board policies as well as the policies regarding the establishment and implementation of the Sustainable Neighborhood Initiative. Fr. Nutt's Deposition, pg. 20. There is nothing in the record to show that any one from ARCHS had supervisory control over Fr. Nutt. While it appears that as a board member Fr. Nutt's tenure was subject to review by ARCHS, his tenure as a board member cannot be viewed as one of "employment".

Regardless of whether Fr. Nutt can be characterized as plaintiff's "supervisor" or "coworker", plaintiff's same-sex sexual harassment hostile work environment claim must fail. The alleged harassment by Fr. Nutt was not so severe or pervasive as to alter a term, condition, or privilege of LeGrand's employment.

An employee is subject to hostile work environment sexual harassment when "the workplace is permeated with

discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meriwether*, at 993 *quoting Harris*, 510 U.S. at 21; *Duncan*, at 934. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VI's purview." *Oncale*, 523 U.S. at 81. Thus, the fourth element of a *prima facie* case of a hostile work environment claim sets forth both an objective and subjective component: an environment that the plaintiff perceives as abusive and an environment that a reasonable person would perceive as hostile. *Duncan*, at 934 *citing Harris*, 510 U.S. at 21-22. This determination requires examining the totality of the circumstances surrounding the discriminatory conduct, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23; *Alagna*, at 980 *quoting Harris*, supra.; *Duncan*, at 934 *quoting Harris*, supra. "These standards are demanding - to be actionable, conduct must be extreme and not merely rude or unpleasant to affect the terms and conditions of employment." *Alagna*, at 980 (citations onutted). More than a few isolated incidents are required to meet this high standard. *Clearwater v. Independent School District Number 166*, 231 F.3d. 1122, 1128 (8th Cir. 2000). "A discriminatorily abusive work environment may exist where the harassment caused economic injury, affected the employee's psychological well-being, detracted from job performance, discouraged an employee from remaining on the job, or kept

the employee from advancing in his or her career." *Quick,* at 1378 *citing Harris,* 510 U.S. at 21-22.

Considered as a whole, Fr. Nutt's conduct, however inappropriate and offensive to the plaintiff, was not sufficiently severe or pervasive to satisfy the high standard of a hostile work environment sexual harassment claim. The harassing acts consisted of three separate incidents over a nine-month period with an eight (8) months span of time occurring between the first incident and the second incident. The acts consisted of two requests to watch pornographic movies and masturbate to relieve stress, a hug accompanied by a kiss and brushing of hand against plaintiff's crotch, and a momentary touch of plaintiffs thigh. None of these acts were viewed by other persons. Plaintiff waited several weeks before reporting the first incident to his supervisors and then only did so when approached by his supervisor to discuss his work in general. He reported the other two incidents as directed by his supervisors. Although the Court does not dispute plaintiff's contention that he found these acts highly offensive and objectionable and testified at his deposition that he was physically ill following these acts, the record shows that plaintiff did not take any medical time off due to emotional or physical reactions to Fr. Nutt's overtures. Plaintiff sought counseling only on the suggestion of his supervisors, and then only went twice in early May 2001.[12] The only physical complaint plaintiff made to his supervisors was that he had headaches; however, there is nothing in the

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12. As noted earlier, plaintiff did not seek medical treatment or additional counseling relating to his encounters with Fr. Nutt until after he had filed his EEOC charge and taken medical leave.

record to show that these headaches affected his job performance. Meanwhile, during the time these incidents occurred, plaintiff took vacation days and traveled for pleasure. Even accepting that plaintiff was upset and embarrassed by Fr. Nutt's advances, as a matter of law, plaintiff has failed to show that these three (3) incidents in the aggregate were so severe or pervasive that a reasonable person would find that the terms or conditions of plaintiffs employment were altered. Summary judgment is granted in favor of defendant ARCHS on plaintiffs Title VII and MHRA hostile work environment claims.

Accordingly, summary judgment is granted on plaintiffs Title VII and MHRA claims for *quid pro quo* sexual harassment and hostile work environment sexual harassment.

Dated this 17th day of December, 2003.

SENIOR, UNITED STATES DISTRICT JUDGE
s/ Stephen Limbaugh

(2)

No. 04-1421

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

RODRICK LeGRAND,

Petitioner,

v.

AREA RESOURCES FOR COMMUNITY AND HUMAN SERVICES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTION PRESENTED FOR REVIEW

The Question Presented by Petitioner does not accurately reflect the issue in this case. Specifically, Petitioner overstates the issue in hopes of creating some reason for this Court to grant review. Concisely stated, the only issue properly raised in this case is as follows:

Whether three (3) isolated invitations for a relationship over a nine (9) month period with eight (8) months between the first and second incidents is sufficient to state a cause of action for hostile work environment harassment, particularly where the alleged harasser was not an employee of the organization and did not have frequent contact with the Petitioner.

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STATEMENT OF THE CASE

Petitioner Rodrick LeGrand ("LeGrand") brought a claim against Respondent Area Resources for Community and Human Services ("ARCHS") on May 3, 2002. LeGrand alleged two counts of sexual harassment, one claim for *quid pro quo* harassment and one claim for hostile work environment.

LeGrand was employed by ARCHS as a neighborhood facilitator. In that capacity, LeGrand worked with residents and community leaders to facilitate a planning process for development of the community, entitled the Sustainable Neighborhood Initiative.

Father Maurice Nutt, the alleged harasser, was neither employed by ARCHS nor was he LeGrand's supervisor. Father Nutt was a member of the Board of Directors of ARCHS and a co-chair of the Sustainable Neighborhood Initiative. As a Board member of ARCHS and a co-chair of the Sustainable Neighborhood Initiative, Father Nutt had no authority over LeGrand, or over any of LeGrand's supervisors.

LeGrand alleged in his lawsuit just three separate incidents over a span of nine (9) months to support his claim of hostile work environment: 1) on or about March 22, 2001, Father Nutt invited LeGrand to watch pornographic movies with him and talked with LeGrand about relieving stress through masturbation; LeGrand declined Father Nutt's offer and did not have any unusual contact with Father Nutt for a long period of time; 2) almost eight months later, LeGrand alleges that at the end of November 2001, Father Nutt mentioned the pornographic videos again, kissed LeGrand on the lips and touched his rear; and 3) in December 2001, Father Nutt briefly touched

LeGrand on the thigh during a meeting with three other individuals present. LeGrand admits that after solicitation from his immediate supervisors, he revealed what allegedly occurred regarding the first event and that his supervisors took prompt remedial action. LeGrand also admits that the alleged incidents stopped for nearly eight months following his supervisors' advice.

The second incident allegedly occurred in late November or early December. Father Nutt kissed LeGrand after a hug. According to Father Nutt, the brief kiss with LeGrand was entirely welcome and LeGrand did not object. LeGrand alleges that Father Nutt also touched his backside, and invited him to watch pornographic movies again, which Father Nutt denies.

The third incident alleged by LeGrand involved only a brief touch on LeGrand's thigh that occurred in a conference room with three other individuals present and was not accompanied by any sexual comments. LeGrand testified that he "moved [Father Nutt's hand] very quickly." Petitioner's App. at 16a. LeGrand contacted his supervisors each time an incident occurred and he only made four reports, with two of the reports concerning the single March, 2001 incident.

More specifically, LeGrand reported Father Nutt's conduct to his supervisors, Lisa Potts and Lucille Walton, on four dates – April 2, 2001, April 18, 2001, November 19, 2001, and December 10, 2001.

During April of 2001, Ms. Potts and Ms. Walton provided the following suggestions to remedy LeGrand's Complaint:

- Told LeGrand to avoid further contact with Father Nutt;
- Told LeGrand to seek counseling with EAP;
- Offered reassignment to a different neighborhood so that contact with Father Nutt would be limited (because Father Nutt's parish was located in LeGrand's neighborhood);
- Suggested that one of LeGrand's co-chairs attend meetings with LeGrand;
- Offered to attend meetings with LeGrand themselves; and
- Offered to move LeGrand's office from the community to ARCHS' offices a few miles away.

After receiving the advice from his supervisors, LeGrand admitted that indeed he was able to avoid contact with Father Nutt following the March 22, 2001 alleged incident, as evidenced by the fact that no alleged acts of harassment occurred for eight (8) months after LeGrand was counseled by his supervisors. Father Nutt also confirmed that LeGrand avoided contact with him.

LeGrand's job responsibilities did not require him to meet with Father Nutt. Petitioner's App. at 15a. LeGrand admits that Ms. Potts and Ms. Walton laid out a plan with him following his first complaint, as outlined above. LeGrand also admits that Ms. Potts and Ms. Walton offered to move his office from the neighborhood in which he was working to ARCHS' office in a different neighborhood. A move to a different neighborhood would have eliminated LeGrand's contact with Father Nutt based on the fact that Father Nutt's church would not be located in

that neighborhood. LeGrand failed to move his office to ARCHS' location away from Father Nutt's parish.

After LeGrand complained about Father Nutt's conduct again in December 2001 and contemporaneous with his charge of discrimination, ARCHS conducted formal investigation. As a result of the investigation, ARCHS determined that Father Nutt may have violated ARCHS' rather strict sexual harassment policy and requested the resignation of Father Nutt from the Board of Directors through correspondence with his attorney, Frank Kaveney. Father Nutt complied with the request and resigned in February 2002. Petitioner's App. at 17a.

During LeGrand's employment with ARCHS and specifically during the time of the alleged incidents of harassment, from March-December 2001, LeGrand did not incur an increased number of absences. Petitioner's App. at 17a. He did, however, voluntarily take vacation days from work on March 26-31, July 20, August 2-3, August 6-10 and August 17, 2001. LeGrand took vacation days in August to travel to Washington D.C. to attend a workshop for a democracy organization. Petitioner's App. at 17a.

LeGrand also engaged in leisure activities during the alleged period of harassment, including traveling to Kansas City in the Fall of 2001 to attend a college football game with a fraternity brother. LeGrand was never otherwise absent from work until he voluntarily took medical leave in January 2002 (after he had already filed a charge of discrimination with the Equal Employment Opportunity Commission), nearly ten months after the first alleged incident of harassment and one month after the last of the three incidents.

LeGrand's medical leave also followed his filing of the charge of discrimination. In addition, LeGrand sought medical treatment from a new primary care physician and counseling from a new private therapist (apart from the limited counseling with an EAP counselor) only after he filed his charge of discrimination and took medical leave.

LeGrand was never disciplined in any manner during his employment with ARCHS. He never received a demotion or any reductions in pay. Petitioner's App. at 20a. However, when LeGrand was on medical leave, ARCHS eliminated all the positions of Neighborhood Facilitator in the organization, including LeGrand's position, due to a reduction in financial resources. ARCHS then offered LeGrand a comparable position, which LeGrand declined stating that he was earning more money at a new job.

As a Board Member of ARCHS, Father Nutt consulted and advised Ms. Potts and Ms. Walton, but did not have any authority to make recommendations on employment matters. Petitioner's App. at 3a, 14a-15a. The structure of ARCHS and the Sustainable Neighborhood Initiative (LeGrand's focus) did not provide Father Nutt the opportunity to evaluate LeGrand's performance and Father Nutt had no direct authority over LeGrand's employment.

LeGrand filed this lawsuit in the United States District Court for the Eastern District of Missouri, alleging *quid pro quo* sexual harassment and same-sex workplace hostile environment sexual harassment. The District Court granted ARCHS' motion for summary judgment. The District Court found that LeGrand's *quid pro quo* sexual harassment claim involved nothing more than unfulfilled threats and lacked any detrimental employment action as a result of LeGrand's failure to submit to

Father Nutt's alleged sexual overtures. Petitioner's App. at 19a.

LeGrand filed an appeal with the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit").[1] The Eighth Circuit affirmed the District Court's decision. The Eight Circuit held Father Nutt's behavior, although boorish and uncivil, did not rise to the level of actionable hostile work environment sexual harassment. More specifically, the Court held that the three incidents over a nine month period were not so severe or pervasive as to alter LeGrand's work environment:

> There can be no doubt Father Nutt's actions, admitted and alleged, ranged from crass to churlish and were manifestly inappropriate; however, the **three isolated incidents, which occurred over a nine-month period, were not so severe or pervasive as to poison LeGrand's work environment**.

(emphasis supplied); Petitioner's App. at 9a. Accordingly, the Eighth Circuit found that LeGrand failed to establish the existence of a trial-worthy question of fact on his hostile work environment claim.

This Court should deny LeGrand's petition for a writ of certiorari. The Eighth Circuit and the District Court properly dismissed LeGrand's claim. In addition, LeGrand's petition does not raise important issues for this Court, which has issued several recent opinions on sexual

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[1] On appeal to the Eighth Circuit, Petitioner abandoned his *quid pro quo* claim and only sought to appeal the District Court's order dismissing his same-sex hostile work environment sexual harassment claim.

harassment, or otherwise set forth compelling reasons warranting grant of a writ of certiorari. If accepted for review, this case would involve matters relevant and applicable only to the parties in this case. Therefore, LeGrand's petition should be denied.

SUMMARY OF THE ARGUMENT

This Court should deny LeGrand's petition for a writ of certiorari. The Eighth Circuit properly held that three isolated incidents over the course of nine-months, with an eight-month span of time between the first and second incidents, were not sufficiently severe or pervasive to alter LeGrand's working environment so as to constitute a hostile work environment.

In addition, LeGrand has not demonstrated a split in the circuits, nor has he demonstrated that the Eighth Circuit and the Circuit Court of Appeals in general have articulated and applied an improper standard in sexual harassment cases. LeGrand's petition simply does not set forth sufficient grounds or compelling reasons to grant a writ of certiorari. If accepted for review, the case would involve matters applicable and relevant only to the parties in this case. Accordingly, LeGrand's petition should be dismissed.

REASONS FOR DENYING PETITION FOR A WRIT OF CERTIORARI

I. THE PETITIONER HAS FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES.

LeGrand's petition for a writ of certiorari should be denied because LeGrand has not asserted sufficient grounds to justify review by this Court. Supreme Court Rule 10 states that this Court will grant a writ of certiorari "only for compelling reasons," and sets out such circumstances. Not only has LeGrand failed to identify any such circumstances in support of his request for certiorari, he has also failed to set forth any compelling reasons that militate in favor of the granting of certiorari.

The legal basis upon which LeGrand seeks review is, surprisingly, not at all clear from LeGrand's Petition. LeGrand appears to argue that the Eighth Circuit, despite citing to this Court's precedent on defining hostile work environment harassment, incorrectly determined that the alleged actions of Father Nutt were not sufficiently severe or pervasive to alter LeGrand's conditions of employment and did not create a hostile work environment. As is clear in the Supreme Court's Rules, a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Rather than create a new standard, the Eighth Circuit simply applied the stated rule of law previously established by this Court.[2] Petitioner has not cited to any

[2] Petitioner appears to seize on a comment in the last paragraph of the Eighth Circuit's opinion (see Appendix A at 9a) and infer that the Eighth Circuit has somehow added a requirement that hostile work environment harassment must be physically violent or overtly

(Continued on following page)

clear split among the Circuits. Finally, the Circuit Courts of Appeal in general have not distorted what this Court has articulated as "severe or pervasive" under Title VII's sexual harassment hostile work environment component.

This case presents none of the bases for review suggested in Rule 10. While the reasons cited in the rule are not exhaustive, the Court should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals." *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387 (1923).

LeGrand does not assert that the decision in this case creates the sort of conflict confusion suggested in Rule 10. He simply states that the Eighth Circuit erred and that despite its use of the *Faragher* test, it has somehow misapplied this Court's guidance in hostile work environment sexual harassment cases. This Court has ruled often and recently on hostile work environment

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threatening to be actionable. This is simply not the case and severely overstates the Eighth's Circuit's test, which simply follows well-settled, and very recent, precedent of this Court. In fact, the Eighth Circuit opinion merely references, in passing, that the alleged harassment was neither physically violent nor overtly threatening. The opinion does not hold that conduct would need to be physically violent or overtly threatening to rise to the level of being actionable. The Eighth Circuit's opinion is no different than that of this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998), which held that "Isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."

sexual harassment cases and additional guidance over this case would not be instructive to the public.

A. The Eighth Circuit Correctly Determined That The Alleged Actions Of Father Nutt Were Not Sufficiently Severe Or Pervasive To Alter Legrand's Conditions Of Employment And Did Not Create A Hostile Work Environment.

The Eighth Circuit correctly determined that the alleged actions of Father Nutt were not sufficiently severe or pervasive to alter LeGrand's conditions of employment and did not create a hostile work environment. LeGrand's petition for a writ of certiorari merely disputes the Eighth Circuit's ruling regarding whether the actions of Father Nutt were sufficiently severe or pervasive to alter LeGrand's working conditions, thus, creating a hostile work environment. To support his belief, LeGrand draws comparisons to the actions that occurred in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993); and *Carrero v. New York City Housing Auth.*, 890 F.2d 569 (2nd Cir. 1986). The alleged conduct in these cases, committed by direct supervisors with daily contact with their victims, was, however, far more egregious than the contact involved in the instant case.

The facts LeGrand alleges constitute a hostile work environment consists of three, admittedly isolated, incidents with Father Nutt spread out over nine (9) months. The first alleged incident occurred in March of 2001. LeGrand alleges that Father Nutt asked LeGrand if he would like to watch pornographic videos and talked to him about relieving stress through masturbation. Petitioner's App. at 3a and 15a. Plaintiff rejected Father Nutt's

request. As a result, Father Nutt stopped asking LeGrand for eight months. LeGrand's supervisors provided him with steps on how to remedy the situation. The advice of LeGrand's supervisors was effective, because LeGrand had no further issues with Father Nutt until almost eight (8) months later – in November. Petitioner's App. at 3a, 4a, and 16a.

In November, LeGrand was approached again by Father Nutt. Father Nutt allegedly mentioned the pornographic videos again, kissed LeGrand on the lips and touched his rear. The final alleged incident occurred in December, 2001. Father Nutt allegedly touched LeGrand's thigh during a meeting with three other individuals present. Petitioner's App. at 16a.

In contrast, in *Meritor v. Vinson,* the plaintiff alleged that her **immediate supervisor** sexually harassed her for **four** years. During those four years, plaintiff's supervisor made repeated demands for sexual favors, during and after business hours. She also estimated that her supervisor made her have sex with him 40 to 50 times over a four year span. The plaintiff was also fondled in front of other employees, was followed into the restroom when she went alone, and the supervisor exposed himself and even forcibly raped her several times during the same four year span. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 60.

To compare *Harris*, a case involving rape and daily harassing conduct to a case (*LeGrand*) involving only three isolated incidents, by a non-supervisor, spread out over nine months is, at best, illogical. Likewise, in *Harris*, the Plaintiff alleged that that the president of the company, over the course of two (2) years insulted the plaintiff because of her gender, stating that "[Y]ou're a woman

what do you know," "[W]e need a man as the rental manager (the plaintiff's position)," and called her a "dumb ass woman." *Harris* at 19. The alleged harasser also suggested, in front of other co-workers, that the two of them go back to a hotel to negotiate her raise. He would also repeatedly ask Plaintiff to get coins out of his front pockets, and would throw objects to the ground and ask the plaintiff to pick them up. In addition, the alleged harasser made sexual innuendos regarding the plaintiff's clothing, and while the plaintiff was trying to arrange a deal for a customer of the company, asked her in front of other co-workers, "What did you do, promise the guy . . . some [sex] Saturday night?" This alleged activity occurred repeatedly over the span of two years. Again, the conduct in *Harris* is much more egregious than that alleged by Petitioner LeGrand.

In *Carrero v. New York City Housing Authority*, the plaintiff alleged that over the course of two (2) weeks her direct supervisor sexually harassed her. During this two-week period, the alleged harasser touched plaintiff's knee and arm on several occasions, kissed plaintiff on her neck and attempted to kiss her on at least two more occasions all in the course of 14 days. The alleged harasser told the plaintiff that he would fail her on her next probationary report if she did not succumb to his advances. He also repeatedly publicly criticized the plaintiff after she rebuffed his advances. Eventually, the alleged harasser even had the plaintiff demoted.

Each of the plaintiffs in *Meritor, Harris*, and *Carrero* all suffered multiple sexual advances and sexual contact on a regular (if not daily) basis from either their immediate supervisor or the president of the company. Clearly, the alleged acts in those cases are more egregious than

LeGrand, where he was only subjected to three acts in nine months, with an eight (8) month span between the first and second incidents. As evidence of the fact that Father Nutt's conduct was less severe or pervasive than the conduct in *Meritor*, *Harris* and *Carrero*, Petitioner LeGrand not only successfully declined Father Nutt's request to watch pornographic videos, but LeGrand's March, 2001 rejection apparently scared Father Nutt away for eight months. Furthermore, LeGrand did not have to meet with Father Nutt (who was neither an ARCHS' employee nor LeGrand's supervisor) as a condition of his employment and did not see him or have contact with him on a regular basis. Finally, Father Nutt was not even in a position to affect Plaintiff's employment. The Eighth Circuit did not err in finding that the actions of Father Nutt were not sufficiently severe or pervasive to alter LeGrand's work environment and create a hostile working environment.

Moreover, contrary to LeGrand's suggestions, Father Nutt was not capable of permeating the environment with offensive and overly sexual words and deeds, given that there was no requirement that LeGrand meet with Father Nutt and LeGrand did not interact with Father Nutt on a consistent or regular basis. Finally, LeGrand's statement that Father Nutt created a hostile work environment because he commented that LeGrand's advancement in the company could have been improved by a relationship with Father Nutt simply does not match the evidence of record. LeGrand was aware that Father Nutt did not have authority or the ability to make employment decisions regarding LeGrand. Obviously, LeGrand was aware Father Nutt had no authority to affect his employment because nothing happened during the eight months in

between Father Nutt's first and second incidents. LeGrand was not the victim of any adverse employment decisions when he rebuffed Father Nutt's earlier advances. Father Nutt's advances amounted to no more than what the Eighth Circuit correctly pointed out as unfulfilled threats by an individual not even employed by the organization.

LeGrand's citation to *Meritor*, *Harris*, and *Carrero*, do nothing but support the Eighth Circuit's opinion. The alleged actions in *Meritor*, *Harris*, and *Carrero* were all more egregious in that the alleged harasser was a person with supervisory authority over the plaintiff, had daily contact with the plaintiff, and whose misconduct ranged from rape to eight counts of touching over just a two week period.

B. This Case Does Not Involve A Split Of Authority Among The Circuits.

This case does not involve a split among the circuits. Under Supreme Court Rule 10, certiorari may be considered where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The type of conflict required between the circuit courts to warrant the grant of certiorari is a direct conflict regarding specific issues of law. *See, e.g.*, *Jaffe v. Redmond*, 518 U.S. 1 (1996) (certiorari granted to resolve conflict between several Circuits regarding whether federal courts should recognize a psychotherapist-patient privilege under the Federal Rules of Evidence); *Bingler v. Johnson*, 394 U.S. 741, 747-748 (1969) (certiorari granted to resolve conflict between Third Circuit's ruling and

ruling by the Fifth Circuit regarding validity of a treasury regulation); *United States v. O'Malley*, 383 U.S. 627, 630-631 (1966) (certiorari granted to resolve conflict between Seventh Circuit's decision and a previous ruling by the First Circuit regarding whether to exclude from a taxable estate the portion of the trust principal representing accumulated income and order an appropriate refund); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (certiorari granted to resolve conflict between the Fourth Circuit's decision below and that of the Second and Fifth Circuits regarding whether a "stipulation" in a plea agreement must be part of the "quid pro quo" for the government's agreement not to charge a higher offense).

This case simply does not present any decision by the Eighth Circuit that is in direct (or even indirect) conflict with any other circuit on the specific issues. In fact, LeGrand concedes later in his brief that the conflict is not among the Circuits, but is, instead, a "conflict" (albeit erroneous) between the Circuit Courts of Appeal and the Supreme Court. By making this admission, Petitioner implicitly concedes that the asserted error is simply a "misapplication of a properly stated rule of law," which, this Court's rules specifically state, should "rarely" serve as a basis for a writ of certiorari. Supreme Court Rule 10.

C. Even If There Were A Split In The Circuit Courts Of Appeal, The Eighth Circuit Articulated And Applied The Proper Standard.

The Eight Circuit articulated and applied the proper standard in this case. The Eighth Circuit stated that in order to establish a *prima facie* case of hostile work environment sexual harassment, LeGrand "must prove (1) he is a member of a protected group, (2) he was subjected

to unwelcome harassment, (3) the harassment was based on sex, and (4) the harassment affected a term, condition, or privilege of his employment." Petitioner's App. at 22a. The Eighth Circuit held that in order to meet the fourth element, LeGrand had to "demonstrate the unwelcome harassment was sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment. *Id.* The Eighth Circuit went on to say "LeGrand must prove his workplace was 'permeated with discriminatory intimidation, ridicule, and insult.'" This exact framework has been repeatedly articulated by this Court. *See, e.g., Harris* at 21. In making this determination, the Eighth Circuit further stated that it considered the "totality of the circumstances." Petitioner's App. at 7a. When considering the totality of the circumstances, the Eighth Circuit noted that it would examine "a number of factors, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees' work performance.'" *Id.* The Eighth Circuit obviously followed this Court's guidelines as set out in *Harris*, where this Court stated:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance."

Harris at 23. LeGrand cannot demonstrate that the Eighth Circuit applied an improper standard.

D. There Is No Conflict Between The Circuit Courts Of Appeal And This Court.

There is no conflict between the Circuit Courts of Appeal and this Court. LeGrand argues that because the Eighth Circuit and other appellate courts have stated in opinions that "more than a few isolated incidents are required" in order to prove sexual harassment, there is a conflict between the Circuit Courts of Appeal and this Court. Again, this Court has ruled on sexual harassment cases often and recently, and has never articulated that the Circuit Courts of Appeal were misapplying the standards set by this Court.

In a futile attempt to bolster his baseless claim of a conflict between the Circuit Courts of Appeal and this Court, LeGrand argues that according to the Circuit Courts of Appeal, a single occurrence of rape would not constitute sexual harassment. First, LeGrand has not alleged that he was raped and has not alleged that any particular act of Father Nutt was sufficiently severe or pervasive to constitute actionable sexual harassment. Second, the Eighth Circuit in this case reviewed the "totality of the circumstances" and not just each isolated incident. Petitioner's App. at 7a. Finally, LeGrand provides no citation to any cases that have held a single incident of rape would not constitute actionable sexual harassment under Title VII.

Even if there were a conflict between the Circuit Courts of Appeal and this Court regarding whether one isolated incident is sufficient to constitute sexual harassment, which there is not, it still does not affect the dismissal of LeGrand's claim. LeGrand has alleged only three isolated incidents of harassment. Petitioner's App. at 3a,

4a, 9a, 15a, and 16a. The Eighth Circuit took the totality of those three instances and correctly determined that even as a group, Father Nutt's alleged actions were insufficient to alter LeGrand's working environment, as would be necessary to create a sexually hostile working environment. Petitioner's App. at 9a. Even if there were a conflict between the Circuit Courts of Appeal and this Court, it would still not affect the dismissal of LeGrand's claims.

CONCLUSION

LeGrand's claims against ARCHS have been fully examined and dismissed. LeGrand should not be able to argue simply that he disagrees with the Eighth Circuit's finding that the actions of Father Nutt were insufficient to constitute actionable sexual harassment, without citing to some error. LeGrand has failed to articulate any reason why this Court should grant his petition for a writ of certiorari. ARCHS respectfully requests, therefore, that this Court deny LeGrand's petition.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

RODERICK LeGRAND,

Petitioner,

v.

AREA RESOURCES FOR COMMUNITY AND HUMAN SERVICES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

Respondent urges that LeGrand has merely argued that the Eighth Circuit misapplied this Court's test for determining whether LeGrand suffered actionable sexual harassment. This is not a case where the lower court simply misapplied a properly stated rule of law. The court below went beyond this Court's decisions and defined a new standard for determining whether conduct is "sufficiently severe or pervasive" for purposes of a Title VII hostile work environment claim. Simply put, the opinion below is wrong in light of this Court's precedent.

The Eighth Circuit departed from this Court's sexual harassment jurisprudence and applied a new, more stringent test in which it held that "more than a few isolated incidents are required" and that incidents must be so intimidating, offensive or hostile as to "poison" the work environment. Petitioner's App. at 7a. The Eighth Circuit admitted as much when it concluded that LeGrand failed to allege an actionable sexual harassment claim as a matter of law:

> Viewing LeGrand's claim *in light of the demanding standard set by the Supreme Court and by Duncan and its progeny,* Father Nutt's behavior did not rise to the level of actionable hostile work environment sexual harassment."

Petitioner's App. at 9a (emphasis added). This admission is significant. The Eighth Circuit clearly did not limit its analysis of LeGrand's sexual harassment claim to the standard set by this Court. Instead, it went beyond this Court's precedent and also viewed LeGrand's claim in light of another standard based on "*Duncan* and its progeny," a series of Eighth Circuit harassment cases.[1] As such, the decision warrants review pursuant to Supreme Court Rule 10(c), because the Eighth Circuit applied a legal standard that conflicts with relevant hostile work environment decisions of this Court.

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[1] These cases were aptly described as a "parade of horribles" in *Ricklefs v. Orman,* 2003 U.S. Dist. LEXIS 22978 at *32 (N. D. Iowa 2003).

II. ARGUMENT

A. The Decision Below is a Sweeping Circumvention of this Court's Sexual Harassment Jurisprudence.

This Court has clearly stated that conduct must be sufficiently "severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67 (1986) (brackets in original). "Extremely serious" isolated incidents may amount to discriminatory changes in the terms and conditions of employment. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998). The Eighth Circuit has not been faithful to this Court's sexual harassment jurisprudence and has created a new test in which "[m]ore than a few isolated incidents are required," apparently regardless of whether or not those incidents are extremely serious. Petitioner's App. at 7a.

B. A Few Severe Incidents Can Sustain an Actionable Title VII Hostile Environment Sexual Harassment Claim

Under the new but not improved Eighth Circuit test, the following conduct was deemed not sufficiently severe or threatening to establish a hostile work environment: (1) Father Nutt asked LeGrand to watch pornographic movies and masturbate together to relieve stress; (2) Father Nutt suggested LeGrand would advance within the company if LeGrand watched the movies and performed sex acts on Father Nutt; (3) Father Nutt admittedly hugged and kissed LeGrand on the mouth; (4) Father Nutt admittedly brushed LeGrand's crotch with the back of Father Nutt's hand because he thought LeGrand was stimulated by the hug; (5) Father Nutt grabbed LeGrand's buttocks; and (6) Father Nutt gripped LeGrand's thigh under the conference table at a meeting. Petitioner's App. at 3a-4a, 15a-16a.

Respondent's Brief wholly ignores that Father Nutt admitted to "brush[ing LeGrand's] crotch with the back of my hand [, . . .b]ecause it seemed that [LeGrand] was stimulated by the hug." Petitioner's App. at 4a, 16a. Respondent offers a sanitized version

of this incident, stating that Father Nutt merely "touched" LeGrand's "rear" or "backside." Respondent's Brief at 1, 2, 11. This omission is significant. There is no getting around the fact that Father Nutt admitted to touching LeGrand's genitals in an intentionally sexual way.

Ultimately, it is more troubling that the court below considered the admitted genital touching and still found as a matter of law that such conduct, standing alone or coupled with an admitted kiss on the mouth and other allegations of sexual advances, was not serious enough to establish a prima facie hostile work environment claim. This Court specifically recognized *Carrero v. New York City Housing Auth.*, 890 F.2d 569 (2nd Cir. 1986) as a case involving conduct extreme enough to amount to a change in the terms and conditions of employment. *Faragher*, 524 U.S. at 788. The plaintiff in *Carrero* claimed that her direct supervisor touched her knee and arm, kissed her neck, attempted to kiss her on the lips, and told her he planned to fail her on her probationary report. *See Carrero v. New York City Housing Auth.*, 890 F.2d 569, 573, 578 (2nd Cir. 1986).

The physical conduct alleged in *Carrero* is certainly less severe than that which admittedly occurred between LeGrand and Father Nutt. The harasser in *Carrero* did not actually kissing the plaintiff on the lips or brushing her genitals with the back of his hand. Given that the *Carrero* facts are less severe than those admitted in *LeGrand*, the hostile environment claim in *Carrero* would fail under the Eighth Circuit's new test, despite this Court's recognition that *Carrero* "heeded [its] view" regarding conduct extreme enough to amount to a change in the terms and conditions of employment. *See Faragher*, 524 U.S. at 788.

C. The Harasser's Status is Relevant in Analyzing the Severity of the Harassment.

This Court has recognized that harassment by a supervisor or successively higher official or manager differs from co-worker harassment when determining employer liability. *See Burlington*

Indus. v. Ellerth, 524 U.S. 742, 747-48 (1998). Employers are vicariously liable for supervisor harassment that results in a tangible employment action. *Id.* at 761-62. While the impact of the agency relationship may be "less obvious" in cases where no tangible employment action occurred, it is still worth examining whether a supervisor harasser is aided by the agency relationship in the commission of harassment when determining whether the harassment itself is actionable. *See Ellerth,* 524 U.S. at 763; *Steck v. Francis,* 365 F. Supp. 2d 951, 971 (N. D. Iowa 2005).

The Seventh Circuit Court of Appeals has specifically held that a supervisor's use of racial epithets has a more severe impact on the work environment than a co-worker's use of such harassing words. *Dandy v. UPS,* 388 F.3d 263, 271 (7th Cir. 2004). The New Jersey Supreme Court extended this reasoning to sexual harassment cases and recognized that racial and sexual harassment by a supervisor has more severe impact than similar harassment by a co-worker. *Taylor v. Metzger,* 152 N.J. 490, 706 A.2d 685, 692 (N. J. 1998). The United States District Court for the Northern District of Iowa agreed that a supervisor's status should be considered when analyzing the severity and nature of the harassment in *Steck v. Francis,* 365 F. Supp. 2d 951 (N. D. Iowa 2005):

> When the harasser is a supervisor, the impact of the harassment is heightened: Harassment by a supervisor appears to carry the weight and imprimatur of the employer's authority and seems to authorize or condone like conduct by subordinates, thereby fostering a perception that the environment as a whole is hostile. Moreover, as the supervisor harasser is further removed from daily contact with the victim or as the supervisor harasser rises in the hierarchy, harassing incidents may become the most salient feature of the relationship between the harasser and the victim, even as they may become less frequent.

Id. at 972.

In this case, the few isolated incidents between LeGrand and Father Nutt certainly make the unwelcome sexual comments and conduct the "salient feature" of their relationship. Father Nutt was not LeGrand's direct supervisor, but he was a member of the Board of Directors of Area Resources for Community and Human Services (ARCHS) and co-chair of the Sustainable Neighborhood Initiative (Initiative). In that sense, he was a "higher official" for purposes of LeGrand's hostile environment claim, given that LeGrand was employed by ARCHS and his direct supervisors were the Initiative Coordinators. As an ARCHS board member, Father Nutt consulted and advised LeGrand's direct supervisors on "neighborhood issues." He was not a member of the Leadership Team or Initiative Personnel Committee that evaluated ARCHS employees' performance, although LeGrand mistakenly believed that Father Nutt was a member of the Leadership Team.[2] At any rate, LeGrand knew that Father Nutt co-chaired the overall Intitiative and LeGrand's job as a neighborhood facilitator including serving three area communities, all of which came within Father Nutt's parish. Petitioner's App. at 2a-3a, 13a-14a.

LeGrand alleged that Father Nutt indicated LeGrand would advance in the company if he watched pornographic movies and masturbated Father Nutt and that rejection of Father Nutt's advances might hurt his career. Petitioner's App. at 3a, 18a. This allegation did not subject ARCHS to strict liability for harassment resulting in a tangible employment action, given that Father Nutt's comments about advancing or hurting LeGrand's career did not result in a tangible job detriment. It was simply a case of "unfulfilled threats." Petitioner's App. at 19a.

The trial court addressed the relationship between LeGrand and Father Nutt, determining that Father Nutt's status as an ARCHS board member and co-chair of the Initiative does not "necessarily

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[2] Contrary to Respondent's assertions, LeGrand did believe Father Nutt had authority to affect his employment. *See* Respondent's Brief at 13. He knew Father Nutt was an ARCHS board member and the overall co-chair of the Initiative. LeGrand mistakenly believed Father Nutt was on the Leadership Team. Petitioner's App. at 2a, 14a.

make him an employer of ARCHS, moreover plaintiff's supervisor." Petitioner's App. at 25a. The Eighth Circuit did not consider Father Nutt's status as a supervisor, co-employee or non-employee. Nor did it analyze whether ARCHS took prompt, corrective action when it learned of LeGrand's complaints. It simply held that the alleged conduct did not rise to the level of actionable hostile work environment sexual harassment. Petitioner's App. at 9a. Absent any indication by the Eighth Circuit to the contrary, it determined that the sexual comments and touching were insufficiently severe to establish a prima facie hostile work environment claim, regardless of whether Father Nutt was a supervisor, co-employee or non-employee.[3] Therefore, its "decision could be read to stand for the proposition that the status of the harasser is irrelevant to the determination of whether the environment is 'actionable.'" *Steck v. Francis,* 365 F. Supp. 2d 951, 966 (N. D. Iowa 2005). Also left unanswered is the question of whether a harasser's apparent authority should be considered when analyzing the severity of the alleged conduct.

III. CONCLUSION

In *LeGrand,* the Eighth Circuit disregarded this Court's sexual harassment jurisprudence, rewrote the "severe" component of this Court's sexual harassment jurisprudence and articulated a new quantitative harassment test in which "[m]ore than a few isolated incidents are required" for any hostile environment claim. Petitioner's App. at 7a. This standard contravenes this Court's precedent and should not be allowed to stand. For all of the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for certiorari.

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[3] Lower courts have recognized employer liability for harassment by nonemployees. *See Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); Jarman v. City of Northlake, 950 F. Supp. 1375 (N.D. Ill. 1997).

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